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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. 997.

ATLANTIC & GULF STEVEDORES, INC.,
Petitioner,

versus

AMERICAN EXPORT LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (App. A. of Petition) is reported at 205 F. Supp. 316. The opinion of the Court of Appeals for the Fourth Circuit (App. B. of Petition) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. SHOULD NOT AN EXPERT STEVEDORE WHOSE NEGLIGENCE WAS ADMITTEDLY THE SOLE PROXIMATE CAUSE OF AN ACCIDENT INDEMNIFY THE SHIPOWNER WHO WAS REQUIRED BY JURY TO PAY FOR LONGSHOREMAN'S INJURIES SUSTAINED THEREIN?

2. IS THE CONDUCT OF THE SHIPOWNER AN ISSUE WHERE THE STEVEDORE CONCEDES SOLE RESPONSIBILITY FOR A SHIPBOARD ACCIDENT CAUSING INJURY TO A LONGSHOREMAN?

STATUTE INVOLVED

THIS LITIGATION IS NOT FOUNDED UPON STATUTORY LAW, BUT IS GROUNDED IN THE LAW OF INDEMNITY AS BETWEEN SHIPOWNER AND STEVEDORE AND INCIDENT TO THE CONTRACTUAL RELATION BETWEEN THEM.

STATEMENT

This litigation stems from a shipboard accident in which a longshoreman was injured. He brought suit against the

vessel owner for damages, claiming that the vessel had been unseaworthy and its owner negligent. The vessel owner American Export Lines, Inc., invited the expert stevedore Atlantic & Gulf Stevedores, Inc., to defend the litigation, which invitation was declined because only stevedore negligence was indicated. Thereupon the jury at trial returned a general verdict against Export for $25,000.00, on which verdict the trial court entered judgment. This was paid by "Export", which then filed the present suit seeking indemnity from the stevedore "Atlantic". The basis for indemnity was breach of the expert stevedore's implied warranty of workmanlike service which is the essence of the stevedoring contract between the parties.

The stevedore "Atlantic" at the indemnity trial in the District Court took full blame and responsibility for the accident. It contended both in the District Court and in the Court of Appeals that the only cause of the accident was the improper manner in which its employees conducted the work of loading cargo onto the vessel. No other cause of the accident was suggested by the stevedore, and all of its evidence was intended to show that the longshoremen personnel negligently struck the hatch coaming with a draft of cargo so that its contents fell upon a longshoreman in the vessel's hold.

The shipowner at the indemnity trial presented a different set of facts, based on evidence which was similar to that offered by the injured longshoreman at the first trial. These facts, while involving the condition of the vessel, also pointed to improper performance of the work by the stevedore constituting a breach of contract and proximate cause of the accident.

The trial court, sifting the facts before it, accepted those presented by the stevedore and found that the sole proximate cause of the accident was the negligent and improper manner in which the stevedore did its work. The Court rejected all contentions that the ship had been initially unseaworthy and its owner negligent. Stating that initial liability on "Export" had been erroneously imposed, it refused to require the stevedore to indemnify "Export".

The Court of Appeals for the Fourth Circuit, accepting the finding below as to the cause of the accident, concluded that the stevedoring work had not been properly performed, and thus that the warranty of workmanlike service had been breached by the expert contractual stevedore, "Atlantic". It remarked that the stevedore had neither alleged nor proved any conduct on the part of the shipowner which would preclude indemnity. It returned the case to the District Court, ordering it to grant indemnity and enter judgment for "Export".

ARGUMENT

First Question Presented

1. No new or unique question of law is here presented to this Court for review. The facts and issues are of interest to this case alone, and any review thereof will benefit only the parties involved rather than give guidance to the shipping and stevedoring industries of which they are members.

Here petitioner is an expert stevedore which entered into an oral contract with the respondent shipowner to supply the men, equipment and knowhow with which to load cargo upon a vessel. Petitioner thus unqualifiedly agreed to per-

form these stevedoring operations and to do so properly and with reasonable safety. Its contract in no respect varied from that considered by this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp.* (1956) 350 U.S. 124, and in *Weyerhauser SS Co.* v. *Nacirema Co.* (1958) 355 U.S. 563, and the same responsibilities followed. Thus without question, and as already decided by this Court, if petitioner rendered a substandard performance of its accepted responsibilities, which led to foreseeable damage to respondent shipowner, the latter was entitled to indemnity. *Weyerhauser SS Co.* v. *Nacirema Co.*, supra, pp. 565-567.

Petitioner does not here contest in any fashion the finding of the trial court below that it rendered a substandard performance of its duties and that it failed to measure up to its responsibilities as an expert stevedore. Indeed from the beginning it has urged such a finding. But having persuaded the trial judge to that view, it would now complain because it was required to make respondent whole for the loss sustained thereby.

What petitioner would really do here is pay lip service to the established principles of law involved, and then attempt to avoid the result of their application in this particular case. This it seeks to accomplish by engaging in semantics over the definition of "foreseeable damages". But in so doing petitioner cannot and does not offer a single decision of this Court or any other which indicates any disagreement or misunderstanding over such definition. Petitioner in effect only states the proposition that there are no "foreseeable damages" where on the facts as accepted below the shipowner should never have been held legally liable to the injured longshoreman in the first place! This head in the sand sort of reasoning overlooks the judg-

ment which the shipowner had to pay! As stated by Chief Judge Simon E. Sobeloff in his opinion for the Fourth Circuit reversing the District Court and awarding indemnity,

> ". . . The anomalous result of this reasoning is that responsibility confers complete immunity." (App. B. of Petition, Page 28).

This Court in *Weyerhauser SS Co.* v. *Nacirema Co.*, supra, at Page 567 states:

> "If . . . respondent rendered a substandard performance which led to *foreseeable liability* of petitioner, the latter is entitled to indemnity." (Italics supplied).

Recent Circuit Court of Appeals cases dealing with the right of a shipowner to be indemnified by the stevedore have construed these words quite clearly and without conflict. Thus in *Paliaga* v. *Luckenbach SS Co.*, (CCA 2d) 301 F.2d 403, injured longshoreman sued the shipowner for damages. Before jury verdict, the stevedore settled directly with the longshoreman, by-passing the shipowner. The Second Circuit awarded shipowner its expenses of defense, saying:

> (Page 408) ". . . if the stevedore fails to use reasonable care in handling either equipment or cargo and this failure results in *foreseeable loss to the shipowner by rendering it likely to suit by an allegedly damaged party*, such as a shipper, or to suit by an injured seaman, *or even to suit by an injured longshoreman in the stevedore's own employ*, the stevedore company has

breached its obligation to the shipowner under the contract. (citing cases)." (Italics supplied).

So also the Fourth Circuit in *Rederi A/B Dalen* v. *Maher* (CCA 4th) 303 F.2d 565. Again injured longshoreman sued shipowner, and stevedore settled directly before Court decision on initial liability. Shipowner was allowed its counsel fees and expenses from the stevedore:

> (P. 567) "We hold that the District Court erred in treating an adjudication of liability as a basic prerequisite to the shipowner's claim of indemnity. *If a shipowner can show that the stevedore's breach of warranty has occasioned it expense, reimbursement is due.* Of course, the shipowner must prove that the stevedore, in fact, breached its warranty and *caused injury for which the shipowner was potentially liable* and that the expenses incurred in defense are reasonable . . ." (Italics supplied).

So also the Ninth Circuit in *California Stevedore & B. Co.* v. *Pan-Atlantic SS Corp.* (CCA 9th) 291 F.2d 252. Longshoreman settled with shipowner who then sued stevedore for indemnity. The Ninth Circuit approved shipowner's recovery from the stevedore, noted the defenses the shipowner had available against the longshoreman originally, and found that they may or may not have stood up at trial. It then approved the rule that the shipowner need show only *potential liability* to the longshoreman, and that such potential liability fell in the classification of "foreseeable damages".

A District Court case of interest in this regard is *Castwell* v. *K.N.S.M., N.V.* (DC Tex. 1962) 205 F. Supp. 295.

The longshoreman was *defeated* in his claim for damages against the shipowner, since the negligence of the *stevedore* was found to be the *sole* proximate cause of his injuries. The stevedore was required to make good shipowner's loss of counsel fees and expenses incident to suit, the Court finding no distinction between a successful and unsuccessful defense of the original action by the vessel owner:

> (Page 297) ". . . In either instance, the shipowner is put to the time and expenses of defending against an action which springs from the acts or omissions of the stevedore; *in either instance, the stevedore has breached its obligation to the shipowner which has resulted in a loss to the shipowner.* (Italics supplied).

This is another way of saying that if stevedore's breach of warranty renders the shipowner *likely to suit*, and thus subjects the shipowner to the uncertain risks of litigation, then "foreseeable damages", "foreseeable loss", "foreseeable liability" to the shipowner has occurred and indemnity must follow.

It thus is made clear by the decisions of this Court and of the other Federal Courts about the United States that the real issue between the shipowner and stevedore in an indemnity action is not, as petitioner would argue, whether the shipowner should have been liable to the longshoreman. For since potential liability of the shipowner is sufficient in the event it settled the initial claim, actual liability in the event of judgment is obviously also sufficient. The real issue in the separate indemnity action is, as Judge Sobeloff stated in his opinion below,

> ". . . the entirely distinct question whether the exist-

> ing risk of injury as found by the jury was brought into play by the stevedore's failure to perform its contracted services with reasonable safety. Crumady v. The JOACHIM HENDRIK FISSER, 358 U.S. 423 (1959); Calmar SS Corp. v. Naeirema Operating Co., 266 F.2d 79 (4th Cir. 1959) . . ." (App. B. of Petition, Page 29).

This clearly establishes the nature of the subsequent action between shipowner and stevedore.

But petitioner attempts to persuade this Court that the Third Circuit in the cases cited disagrees with this unanimous thinking of all the other Federal Courts. Petitioner would argue that the Third Circuit alone believes that the shipowner's liability to the longshoreman is to be tested twice, first in the original suit by the longshoreman and then again in the indemnity action against the stevedore. We would point out that the *Crawford* case precedes *Ryan* and is not controlling here.

Petitioner overlooks the very recent Third Circuit opinion cited below and which does not support petitioner's argument here. This was *Rogers* v. *United States Line Co.*, 3rd Cir., (1962) 303 F.2d 295, where injured longshoreman sued shipowner for damages. A third-party action was filed by shipowner against cargo consignee employing stevedore. The primary action was separately tried to a jury which found against the shipowner. Then the third-party action came on for a separate trial before the Court. It found that the discharge of cargo had not been carried out in a reasonably safe, proper and workmanlike manner, that the consignee "was under a duty not to expose United States Lines to damage or loss arising out of the discharge

of the cargo", that it had impliedly warranted to the shipowner the careful, proper, and workmanlike performance of the discharge, that the warranty had been breached, and that indemnity followed. The Third Circuit affirmed with this observation:

> (Page 298) ". . . This suit comes well within the Supreme Court's description of the Ryan claim. 'It is a simple action to recover, under a voluntary and self-sufficient contract, for a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on its ship.' Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp., supra, 350 U.S. 130, 76 S.Ct. 235."

Thus all of the Courts since Ryan agree that the shipowner who pays damages to an injured longshoreman, either by way of settlement or judgment, is entitled to then proceed in an indemnity action against the contracting stevedore. They further agree that shipowner's liability having already been established in the tort action, that issue is closed. The shipowner then has the burden only of proving that its risk of loss came about because the stevedore breached its warranty of workmanlike service. On its ability to so prove rests the shipowner's right to indemnity.

The shipowner Export here proved its loss at the indemnity trial. The trial court on the evidence presented then found that the stevedore had negligently handled the cargo while stowing the ship and thus caused the loss to arise. This was a conceded breach of the stevedoring contract. Indemnity was required, in the interest of precedent and fairness.

This present case merely demonstrates the now well es-

tablished pattern of procedure in shipowner-stevedore indemnity cases, presents no novel or different questions, and should not be allowed to take up this Court's time further where the only result can be to reaffirm settled principles of law and to gratify the senses of individual parties.

Second Question Presented

2. Above we pointed out the lack of novelty and the lack of a conflict of decisions on the questions presented. Now we would briefly comment on the conduct of the shipowner as shown by the facts of this case.

Petitioner complains that such conduct should be considered below, so that a determination might be made as to whether that shipowner's conduct forfeited any right it might otherwise have to be indemnified.

This Court has ruled that there are circumstances under which a shipowner's conduct may preclude it from obtaining indemnity. *Weyerhauser SS Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567. That much is settled and without dispute.

Here petitioner does not ask this Court to now define what the nature of the shipowner's conduct must be for the forfeiture to take place. It asks merely that this Court order the Lower Court to consider the question of whether such conduct occurred.

This request requires little comment. The trial court concluded from the facts presented that the negligent actions of the petitioner *stevedore* constituted the *sole* proximate cause of the accident. The shipowner was in no way implicated in the set of facts selected as its findings by the

District Court. Shipowner's conduct was not questioned by that Court or challenged by the stevedore below. As Judge Sobeloff stated in his opinion,

> "... no such conduct is alleged or proved." (App. B. of Petition, Page 29).

How can the stevedore now at this level for the first time seek to discard the fact findings it urged upon the District Court and question the actions of the shipowner, after arguing successfully below that only the stevedore and not the shipowner was responsible for the unfortunate accident which occurred?

Remand on this point would be a useless, futile gesture, as the petitioner well knows. Its request should be refused without merit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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